

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT MONTOKA and DEPARTMENT OF THE ARMY,
WHITE SANDS MISSILE RANGE, NM

*Docket No. 98-1226; Submitted on the Record;
Issued October 13, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits.

On December 19, 1988 appellant, an engineer equipment operator, sustained an injury while in the performance of his duties when the blade of the road grader he was operating struck a piece of concrete, stopping the vehicle cold and causing a sudden jolt to his neck and back. The Office accepted his claim for the conditions of cervical, thoracic and lumbar strains.

On the prior appeal of this case,¹ the Board found that the Office did not meet its burden of proof to establish that the disability resulting from appellant's December 19, 1988 employment injury had ceased by February 6, 1991. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

Appellant's attending family practitioner, Dr. Ravi Bhasker, continued to see appellant monthly for chronic low back pain. He remained of the opinion that appellant, at his age, could not return to work on a grader again.

On November 7, 1997 the Office referred appellant, together with a copy of the medical record and a statement of accepted facts, to Dr. David Neidhart, an orthopedist, for a second opinion on whether appellant continued to suffer disabling residuals of the accepted employment injury. In a report dated November 20, 1997, Dr. Neidhart related appellant's history and complaints. After describing his findings on physical examination, Dr. Neidhart diagnosed history of cervical and lumbar strain and exaggerated pain behavior with chronic pain syndrome. He noted numerous inconsistencies in appellant's evaluation, particularly appellant's reported activity and functional level as compared to the findings on examination. The Waddell's test and psychometric testing supported the diagnosis of chronic pain syndrome. Dr. Neidhart reported

¹ Docket No. 92-565 (issued October 13, 1992).

that there was absolutely no evidence of objectivity on the examination and a wealth of evidence suggesting psychological factors as being the predominant factor in appellant's pain syndrome.

Responding to questions posed by the Office, Dr. Neidhart reported that there were no objective findings of a current condition related to the cervicothoracic or lumbar strains that occurred on December 19, 1988. He stated that there were no radiographic findings consistent with significant injury, though there were degenerative changes consistent with appellant's age both at the time of injury and currently. There was a possible small herniated nucleus pulposus at L5-S1 on the right side, but Dr. Neidhart explained that this was not consistent with appellant's clinical syndrome and was considered of no significance. Dr. Neidhart concluded that the effects of the December 19, 1988 employment injury had ceased and added that the injury of the sort appellant described would resolve within a maximum of three to six months "if behavioral factors do not develop as in this case." As there was no strictly medical disability connected with the injury of December 19, 1988, Dr. Neidhart reported that appellant could return to his previous work. Indeed, Dr. Neidhart estimated that appellant could have returned to his work within three to six months at least after the injury.

In a progress note dated December 10, 1997, Dr. Bhasker noted that appellant continued to complain about his back, continued to have pain down both legs and had some decreased range of motion in his back. Dr. Bhasker diagnosed lumbosacral sprain.

In a narrative report dated December 29, 1997, Dr. Bhasker noted that appellant continued to have low back pain: "He has difficulty moving his back. He is unable to work due to this work-related injury that continues after several years. The effects of the injury have not ceased at this time. He continues to have back pain periodically. He is unable to do any heavy equipment work or labor work." Dr. Bhasker reported that the treatment plan included anti-inflammatory medicine and monthly follow-ups. "At the present time," he stated, "I do feel the patient is totally and permanently disabled."

In a decision dated January 30, 1998, the Office terminated appellant's compensation benefits on the grounds that the weight of the medical evidence, as represented by the opinion of Dr. Neidhart, established that the accepted conditions had resolved.

The Board finds that the Office properly terminated appellant's compensation benefits for the accepted conditions of cervical, thoracic and lumbar strains.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³

² *Harold S. McGough*, 36 ECAB 332 (1984).

³ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

The weight of the medical evidence in this case establishes that appellant's employment-related cervical, thoracic and lumbar strains have resolved. In his November 20, 1997 report, Dr. Neidhart, the orthopedic referral physician, concluded that there were no objective findings of a current condition related to the cervicothoracic or lumbar strains that occurred on December 19, 1988. He explained that there was absolutely no evidence of objectivity on the examination and that there was a wealth of evidence suggesting psychological factors as being the predominant factor in appellant's pain syndrome. He noted numerous inconsistencies in appellant's evaluation, a positive Waddell's test and psychometric testing that supported a diagnosis of chronic pain syndrome. Dr. Neidhart concluded that the effects of the December 19, 1988 employment injury had ceased and that the injury of the sort appellant described would have resolved within a maximum of three to six months "if behavioral factors do not develop as in this case." As there was no disability connected with the injury of December 19, 1988, Dr. Neidhart reported that appellant could return to his previous work.

Dr. Neidhart based his opinion on an accurate factual and medical history and on a thorough examination of appellant. He had a copy of the medical record and a statement of accepted facts to provide a firm foundation for his opinion. In addition, he offered sound medical reasoning to support his conclusion. The Board notes that Dr. Neidhart's opinion is consistent with the opinion given by appellant's attending family physician, Dr. Bhasker, in a report dated August 30, 1989. In that report Dr. Bhasker noted appellant's extensive evaluation by several physicians, including a very thorough examination by Dr. Frank Jones, a specialist in preventative medicine. Appellant had also had a functional capacity evaluation. Dr. Bhasker reported: "The results of this exam[ination] reveal that the patient is really not disabled by actual physical organic problems but more by his perception of his pain and problems." Eight years later, Dr. Neidhart reached the same conclusion: Appellant's pain derived not from physical, organic or orthopedic residuals of the incident that occurred on December 19, 1988 but from the development of psychological or behavioral factors, which Dr. Neidhart diagnosed as chronic pain syndrome.

As the weight of the medical opinion evidence establishes that the accepted cervical, thoracic and lumbar strains have resolved, the Board will affirm the termination of compensation benefits for those conditions.

The January 30, 1998 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
October 13, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member